DOCKET NO.: FST-CV-15-5014808-S	)	SUPERIOR COURT
	)	
WILLIAM A. LOMAS	)	JUDICIAL DISTRICT OF
	)	STAMFORD/NORWALK
Plaintiff,	)	
	)	
v.	)	AT STAMFORD
	)	
PARTNER WEALTH MANAGEMENT, LLC,	)	
KEVIN G. BURNS, JAMES PRATT-HEANEY,	)	
WILLIAM P. LOFTUS	)	
	)	JUNE 30, 2016
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' APPLICATION TO VACATE PREJUDGMENT REMEDY

I. INTRODUCTION

Plaintiff, William A. Lomas ("Lomas") submits this memorandum of law in opposition to Defendants' Application to Vacate the Prejudgment Remedy Imposed Upon Them (the "Motion to Vacate") (Dkt. No. 154.00). This Court should deny the Motion to Vacate because:

- Despite the title of their motion, no prejudgment remedy was "imposed upon" Defendants. They entered into a voluntary stipulation to settle the undisputed part of the case and agreed to a prejudgment remedy regarding the part of the case that remained in dispute. Absent fraud, accident or mistake there are no grounds for revisiting – let alone vacating – these stipulations.
- Defendants had ample opportunity for an evidentiary hearing on Plaintiff's prejudgment remedy application more than eight months ago, and each of the "facts" on which their Motion to Vacate is predicated were known to them at that time.

- Defendants "Compensation Shortfall" analysis is irrelevant to the stipulation placed on the record in September 2015. The stipulation and resulting Order of this Court was not contingent upon any financial performance goals, nor did it incorporate the terms of either the 2009 or 2015 Agreements. It expressly stated that it would remain in place until final judgment or settlement.
- If Defendants are experiencing financial difficulty – as their "Compensation Shortfall" analysis and related argument suggests – that is not a reason to vacate or modify the prejudgment remedy. If anything, this is a reason to keep the Court's Order firmly in place.

II. RELEVANT FACTUAL BACKGROUND

Lomas commenced this litigation in June 2015 by serving and filing a proposed writ of summons and Complaint (Docket No. 100.32) together with an Application for Prejudgment Remedy ("PJR Application") (Docket No. 100.31). The Court scheduled a hearing for September 21, 2015 to adjudicate Lomas' PJR Application. On September 20, 2015, Defendants counsel communicated an offer to "resolve the PJR application." *See* E-mail from Attorney David Lagasse to Attorney Thomas Rechen, copied to Attorneys Mark J. Kovack and Richard Buturla dated September 20, 2015 (**Exh. A**). The next day, rather than proceeding to a contested evidentiary hearing, Attorney Lagasse voluntarily read the following stipulation, in pertinent part, into the record:

> Defendant, Partner Wealth Management, will pay plaintiff, Bill Lomas, every October 15th, for the amount due to repurchase his membership interest as calculated under the 2015 Limited Liability Company agreement. Those payments are as follows: October 15th, 2015, $631,306.99. On October 15th, 2016, $757, 568.39. On October 15th, 2017, $726,003.04. On October 15th, 2018, $694,437.69. And October 15th, 2019, $662,872.34.

> Defendant, Partner Wealth Management will fund an escrow account... with payments made as follows. Which payments will represent the approximate sums in dispute which is the difference between the sums paid, or payable under the 2015 Limited Liability Company agreement, and the sums alleged by plaintiff to be due under the 2009 Limited Liability Company agreement.
>
> So by December 15th, 2015, the sum of $124,793.73....
>
> In addition by December 15th, 2015 an additional $200,651.26....
>
> ...by October 15th, 2016, $274,625.10....
>
> ...by October 15th, 2017, $255,707.70....
>
> ...by October 15, 2018, $237,355.55....
>
> ...by October 15, 2019, $219,003.41....
>
> To the extent that Partners Wealth Management fails to pay any sums to plaintiff or into the escrow account as requires (sic) by this agreement and order, payments will be made by the individual defendants, James Pratt-Heaney, Kevin Burns and William Loftus who have – they will have joint and several liability for making the required payments.
>
> The escrow will remain in place until the earlier of the date of final judgment is entered in this case, or the parties settle the case and the case is dismissed with prejudice....
>
> The agreement and order will be without prejudice and will not impair any of the parties' right to argue that a party is entitled to pay a different repurchase price than the amounts paid and escrowed under the settlement agreement.

See Dkt. No. 121.00.

The first part of the voluntary stipulation was a settlement of that part of this litigation not in dispute; Defendants fully acknowledged that they owed Lomas at least the sums called for by the 2015 Agreement plus 5% interest. This was a partial settlement of the case requiring cash payments directly to Lomas on October 15th of each year for a period of 5 years, with recourse to the individual defendants if any payment was not made. This was not a prejudgment remedy.

The second part of the voluntary stipulation was a prejudgment remedy. This part of the stipulation concerned the disputed part of the case – the difference between the sums plus interest at 6% due under the 2009 Agreement and the sums plus 5% due under the 2015 Agreement. It was specially fashioned and proposed by the Defendants so that they could pay money over time – rather than through a lump-sum attachment or garnishment – into an escrow maintained by a disinterested third party pending a final judgment.

The Court asked all parties on the record if they agreed to the "settlement terms pertaining to the settlement of the prejudgment remedy application." Each party confirmed that he agreed. The Court then accepted the parties' agreement as a stipulation on the record, approved it, and made it an Order of this Court. The Defendants entered into the stipulation and resulting Order with full knowledge of the facts relating to the defenses, set offs and/or counterclaims they now assert.

III. ARGUMENT

A. Absent Fraud, Accident Or Mistake This Court Should Not Revisit Any Part Of The Voluntary Stipulation Or The Resulting Court Order

Defendants' Motion to Vacate misrepresents the nature of this Court's September 21, 2015 Order. It was not "imposed upon" the Defendants at all. To the contrary, they proposed the terms and, following minor revisions resulting from back and forth negotiations, their counsel insisted that he read the terms into the record before this court as part of a voluntary stipulation that the parties then asked this Court to enter as its Order. As set forth above, the stipulated agreement and Order was in two parts – a partial settlement of an undisputed part of the case and a prejudgment remedy for the remaining disputed part of the case. Such agreements and court orders "cannot be altered or set aside without the consent of all parties, unless it is shown that the stipulation was obtained by fraud, accident or mistake." *Gillis v. Gillis*, 214

Conn. 336, 339-40 (1990); *see also Hous. Auth. of City of New Haven v. Goodwin*, 108 Conn. App. 500, 506-07 (2008) ("[a] stipulated judgment, although obtained through mutual consent of the parties, is binding to the same degree as a judgment obtained through litigation, and it necessarily follows that if the judgment conforms to the stipulation, it cannot be altered or set aside without consent of all parties, unless it is shown that the stipulation was obtained by fraud, accident, or mistake." (Internal quotation marks omitted)). "A judgment by consent is just as conclusive as one rendered upon controverted facts." *Fidelity & Casualty Co. v. Jacob Ruppert, Inc.*, 135 Conn. 307, 313 (1949). "A settlement agreement is a contract among the parties." *Housing Authority v. DeRoche*, 112 Conn.App. 355, 370, 962 A.2d 904 (2009). "It is well settled that [w]here the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms.... Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact ... [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law...." *Electric Cable Compounds, Inc. v. Seymour*, 95 Conn.App. 523, 528–29, 897 A.2d 146 (2006).

Here, on questioning from the Court, each Defendant individually expressed his understanding and acceptance of the settlement terms on the record in open court. Lomas did the same. Thus, the parties entered into a new contract before this Court and the Court entered their contract as its Order. Defendants have not suggested any fraud, accident or mistake in entering this stipulation or order. Indeed, there is no basis for such an argument. But in the absence of such a showing, there is also no basis for vacating the parties' stipulation and the Court's Order on that stipulation.

B. All Of The "Facts" On Which Defendants Predicate Their "Draft" Counterclaims Were Known To Them At The Time Of The Stipulation

If Defendants had probable cause for a set-off, defense or counterclaim against the amount of the PJR sought by Lomas in September 2015, they should have asserted it then. All of the relevant "facts" on which their present "draft" counterclaim seems to be based were known to them at that time. For example, it was known in September 2015 that so-called "Confidential Client No. 1 withdrew nearly all of his assets ... in May 2015; and Confidential Client No. 2 withdrew all of his assets ... beginning in August 2015." *See* Affidavit of Jeff Fuhrman, ¶8. Also in September 2015, Defendants must have been aware that Lomas had (i) allegedly previously attended client meetings without a suit and without being clean-shaven; and (ii) allegedly failed to generate certain amounts of annual revenue and new business. *See* "draft" counterclaim, ¶¶ 63, 65, 28-44. In their Motion to Vacate, Defendants make no attempt to explain why they failed to raise these matters as defenses to Lomas' PJR Application. Indeed, there is no explanation because the "facts" were well known to them then. Thus, even assuming that they could have proved these claims or setoffs under some legal theory and then quantified some corresponding monetary adjustment, it is too late for Defendants to argue that the underlying facts now justify vacating the parties' stipulation and this Court's Order.

Roberts v. Triplanet Partners LLC, No. 3:12CV1222 JAM, 2014 WL 1831022, at *1 (D. Conn. May 8, 2014)[1], is instructive. *Roberts* presented a set of facts more favorable to vacating a prejudgment remedy than the facts at bar, yet the court denied the motion to vacate. In *Roberts* the defendants moved to vacate on the grounds that new financial evidence supported reducing its amount. The Court held that the defendants did not convincingly explain why the "new" evidence could not have been adduced at the time of the initial prejudgment remedy; that

[1] A copy of all unreported authority is attached at Exhibit B.

defendants were on notice of the need for a detailed financial accounting at the initial hearing; and that they had many months to retrieve and produce necessary financial information before the evidentiary hearing was conducted. *Id.* at *2. Thus, the Court held, the law of the case doctrine "commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise." *Id.* citing *Gen. Elec. Capital Corp. of Puerto Rico v. Rizvi*, 113 Conn. App. 673, 681-82, 971 A.2d 41 (2009) ("law of the case" doctrine foreclosed successive challenge to prior prejudgment remedy order in absence of "new or overriding circumstances.") In so holding, the Court further stated, "although the purpose of Conn. Gen. Stat. § 52-278k is to allow for modification of an initial prejudgment remedy order in appropriate circumstances, the statute is not an open invitation to parties to delay the retrieval and production of evidence that could have been adduced at an initial hearing." Accordingly, the Court denied defendant's motion to vacate the prejudgment remedy order as well as its affirmative application for a prejudgment remedy and requested order of asset disclosure.

The case at bar deserves the same result. Defendants had full knowledge of the "facts" on which they now predicate their defenses, counterclaims and set offs at the time of the initial hearing on Lomas' PJR Application. As demonstrated by Defendants' "draft" counterclaim, the allegations pre-date the September order. For example, Defendants knew of Lomas' alleged employment related conduct when he withdrew from PWM in January 2015. Defendants also knew of Lomas' purported false promise (the basis for Count Four), as it was made in mid-2013. Likewise, Defendants "knew" of the evidence they now rely upon to suggest that Lomas was soliciting clients in breach of his non-solicitation agreement because Defendants state that the two clients withdrew their funds in May 2015 and August 2015, respectively. If "the only

reasonable inference [was] that Lomas [was] attempting to solicit clients" as Defendants have alleged, they should have opposed the PJR Application and claimed a set off in September 2015. Yet none of these setoffs, counterclaims or defenses were raised. Thus, the parties to the stipulation are bound by it and the Court should not allow Defendants a second bite of the apple simply because they have changed their position more than eight months after Lomas' PJR was resolved. To do otherwise would effectively permit a party who enters into a partial settlement agreement to escape its binding effect merely because that party later regrets his or her decision. Such conduct is contrary to Connecticut law, should not be allowed here, and Defendants' Motion to Vacate should be denied.

C. Defendants' "Compensation Shortfall Analysis" Is Irrelevant To The PJR Entered In Lomas' Favor

A review of the parties' voluntary stipulation makes clear that its terms were not conditioned upon any rights or protections afforded by either of the 2009 or 2015 Agreements. Nor was there any exception to the payment provisions for events of financial difficulty or "compensation shortfall" by PWM and/or the individual defendants.

Defendants' so-called "shortfall analysis" relies for its authority on the 2009 and 2015 Agreements. But those Agreements do not govern the Order entered by this Court on September 21, 2015. If Defendants wanted their stipulation to be conditioned on such financial matters they failed to propose such terms from the outset, let alone bargain for them in their agreement placed on the record in this Court. *See* E-mail from Attorney Lagasse to Attorney Rechen dated September 20, 2015. If Defendants wanted their obligations to Lomas to be governed by either of the 2009 or 2015 Agreements they needed either to honor those agreements and avoid this lawsuit or incorporate those agreements (or any desired parts thereof) into any prejudgment stipulations and orders. They did neither. Thus, the Orders entered by this court are governed

only by the terms of the parties stipulation, which states: "The escrow will remain in place until the earlier of the date of final judgment is entered in this case, or the parties settle the case and the case is dismissed with prejudice...."

D. If Defendants Are Now Experiencing Financial Strain Or Hardship That Is Not A Reason To Vacate The PJR

Defendants "compensation shortfall" argument is illogical and, if adopted by this Court, would turn the purpose of a prejudgment remedy on its ear.

The purpose of the prejudgment remedy statute is to secure, pre-suit, a future judgment where there is at least probable cause to believe that a plaintiff is likely to recover that judgment. If the defendants are experiencing financial difficulties or the individual defendants are not taking home as much profit as they would prefer, that is not a reason to set aside the PJR. That is exactly why the PJR exists and should be maintained. *See Gagne v. Vaccaro*, 80 Conn. App. 436, 452 (2003) ("The purpose of the prejudgment remedy statute is "to secure the defendants' assets, forestalling the dissipation thereof, while awaiting a final judgment.") Lomas obtained a prejudgment remedy at the outset of this litigation to ensure that Defendants' assets were properly attached and secured in the event of a final judgment in his favor.

Here, Defendants complain that their voluntary proposal to settle the PJR Application, the stipulation that followed, and this Court's Order, creates a hardship. But their business and economic convenience is not grounds for reneging on their settlement agreement or the specially designed payments into escrow in lieu of a lump-sum attachment. It certainly is not grounds for setting aside any Order of this Court.

IV. CONCLUSION

For the foregoing reasons, Plaintiff William A. Lomas respectfully requests that the Court deny Defendants' Application to Vacate the Prejudgment Remedy.

THE PLAINTIFF,
WILLIAM A. LOMAS

By: /s/ Thomas J. Rechen
Thomas J. Rechen
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His Attorneys

CERTIFICATE OF SERVICE

This is to certify that on June 30, 2016, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

Richard J. Buturla, Esq.
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/s/Thomas J. Rechen
Thomas J. Rechen

EXHIBIT A

Rechen, Thomas

From: Lagasse, David [mailto:DLagasse@mintz.com]
Sent: Sunday, September 20, 2015 4:17 PM
To: Rechen, Thomas
Cc: Mark J. Kovack; Richard Buturla
Subject: PJR Application Proposal from PWM and Individual Defendants

Hi Tom,

I was able to speak with Kevin, Bill and Jim. We make the following proposal to resolve the PJR application:

1. PWM pays Bill Lomas every October 15 for the amount due to repurchase his membership interest as calculated under the 2015 Operating Agreement as follows (based on Jeff's initial calculation set forth on your Exhibit 8):
    a. October 15, 2015 -- $631,306.99
    b. October 15, 2016 -- $757,568.39
    c. October 15, 2017 -- $726,003.04
    d. October 15, 2018 -- $694,437.69; and
    e. October 15, 2019 -- $662,872.34.

2. PWM would fund an escrow account with a bank no later than October 15 each year (and for 2015 within 60 days of the date of entering the court order tomorrow so we have time to put an escrow agreement in place with a bank) equal to the difference between the principle and interest amounts paid above, and the amount of principle and interest due under the 2009 agreement (based on the payment schedule Jeff prepared and offered as my Exhibit D):
    a. By November 20, 2015 (60 days from tomorrow) -- $200,651.26 ($200,651.26 principle).
    b. By October 15, 2016 – $274,625.10 ($200,651.26 principle, plus $73,973.84 in interest).
    c. By October 15, 2017 – $255,707.70 ($200,651.26 principle, plus $55,056.44 in interest).
    d. By October 15, 2018 – $237,355.55 ($200,651.26 principle, plus $36,704.29 in interest).
    e. By October 15, 2019 – $219,003.41 ($200,651.26 principle, plus $18,352.15 in interest).

3. The escrow would remain in place until the earlier of the date a final judgment is entered in the case, or the parties settle the case and the case is dismissed with prejudice.

4. Any amounts remaining in the escrow account following the satisfaction all amounts due to Mr. Lomas (whether paid to satisfy a judgment or in settlement) will revert to PWM.

5. This settlement would be without prejudice and would not impair any of the parties' rights to argue that a party is entitled to pay a different repurchase right than the amounts paid and escrowed under the settlement agreement.

6. We would enter into the outline of this agreement before the Court tomorrow morning, and the Court would enter it as an order.

I am available on my cell phone to discuss – 973-632-1506. Let me know if the proposal is acceptable to Mr. Lomas.

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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EXHIBIT B

2014 WL 1831022
Only the Westlaw citation is currently available.
United States District Court,
D. Connecticut.

Benjamin ROBERTS, Plaintiff,
v.
TRIPLANET PARTNERS LLC, Sophien Bennaceur, Imed Bennaceur, and Moez Bennaceur, Defendants.

No. 3:12cv1222 (JAM).
|
Signed May 8, 2014.

Attorneys and Law Firms

Brendan John O'Rourke, Lorey Rives Leddy, O'Rourke & Associates, New Canaan, CT, for Plaintiff.

Andrew R. Goldenberg, Jared B. Stamell, Stamell & Schager, LLP, New York, NY, Earle Giovanniello, New Haven, CT, for Defendants.

RULING ON PENDING MOTIONS RELATING TO PREJUDGMENT REMEDY AND FINANCIAL DISCOVERY

JEFFREY ALKER MEYER, District Judge.

***1** This case arises from a failed business relationship between plaintiff Benjamin Roberts and defendants TriPlanet Partners LLC ("TriPlanet") and TriPlanet's managing members, Sophien and Imed Bennaceur. In this ruling, the Court addresses significant issues concerning prejudgment remedy orders as well as outstanding discovery issues relating to the defendants' financial records.

As described more fully in a prior ruling (Doc. # 78), Roberts was a high ranking officer of a major American insurance company when he was recruited in 2010 by Sophien Bennaceur to work for TriPlanet on a major project with the Royal Bank of Scotland. According to the terms of his employment agreement, TriPlanet was to pay Roberts a base salary of $500,000, as well as to grant him an equity stake of up to 25% in the company along with annual equity payouts, based in part on the achievement of certain performance targets. Within two years, however, TriPlanet terminated Roberts' employment in June 2012 after he complained to the Bennaceurs that he had not received his equity payouts.

Two months later, Roberts filed suit in August 2012 seeking full payment of his salary and his annual equity payouts for 2010 and 2011.[1] In October 2012, Roberts filed for a prejudgment remedy, and the Court (*Stefan R. Underhill, J.*) conducted an evidentiary hearing in March 2013 at which both Roberts and Sophien Bennaceur testified. Roberts testified and produced evidence that he had reached his target goals for 2010 and 2011, and that Sophien and Imed Bennaceur had assured him that he had reached these goals; he calculated that he was entitled to more than $9 million in equity payouts. In opposition, Sophien Bennaceur testified that he did not believe that Roberts had earned the full equity interest but "admitted that, because he had yet to fully examine all of the relevant financial data, he was unsure whether Roberts had, in fact, met the various benchmarks outlined in the Employment Agreement that would entitle him to a 15–25% equity stake in the firm." (Doc. # 78 at 6). Sophien Bennaceur also challenged Roberts' estimates of TriPlanet's profit margins, and defendants submitted their own financial summaries outlining TriPlanet's estimated profits in 2010 and 2011; based on defendants' own summaries, Roberts in turn produced a revised damages calculation of $8,858,949.

In June 2013, Judge Underhill entered an order in plaintiff's favor for a prejudgment remedy in the amount of $8,858,949. (*See* Doc. # 78). Judge Underhill noted that "the defendants have voiced less than full-throated opposition to the plaintiff's claims," and that "Sophien testified that he was merely *unsure* whether Roberts had met the targets contemplated under the Employment Agreement, because he has not yet had the opportunity to fully review all of the relevant financial data." *Id.* at 7. Judge Underhill also granted plaintiff's motion for defendants to disclose assets sufficient to satisfy the prejudgment remedy amount.

***2** More motions have ensued. On the one hand, defendants cite new financial evidence as a basis for moving to vacate the Court's prior prejudgment remedy order and to have a new prejudgment remedy order entered in their favor in the amount of $26,000 (along with a corresponding order to require plaintiff's disclosure of assets). (*See* Docs. # 157, # 158). On the other

hand, plaintiff challenges defendants' compliance with the Court's prior order of asset disclosure, and he moves for a preliminary injunction to require defendants to move suitable assets into Connecticut to satisfy the existing prejudgment remedy amount of nearly $8.9 million; he also moves for sanctions stemming from defendants' general failure to comply with a broad range of financial discovery requests. (*See* Doc. # 121). Defendants have cross-moved for sanctions against plaintiff stemming from plaintiff's motion and his alleged failure to comply with discovery requests. (*See* Doc. # 132). Each of these motions is addressed below.

A. Defendants' Motion to Vacate the Prejudgment Remedy Order

Rule 64 of the Federal Rules of Civil Procedure authorizes the Court to enter a prejudgment remedy as may be permitted "under the law of the state where the court is located" in order "to secure satisfaction of the potential judgment." Fed.R.Civ.P. 64(a). Connecticut law in turn allows for entry of a prejudgment remedy if a party shows probable cause that a judgment will enter in the amount sought for a remedy. *See* Conn. Gen.Stat. § 52–278d(a). The prejudgment remedy statute further allows the Court, in its discretion, to modify or vacate a previously ordered prejudgment remedy upon presentation of evidence that would have justified a modification or denial of a prejudgment remedy at the initial hearing. Conn. Gen.Stat. § 52–278k; *see also Common Condo. Ass'ns, Inc. v. Common Assoc.*, 192 Conn. 150, 154, 470 A.2d 699 (1984) (noting court's discretion in prejudgment remedy context and that "court [is] not obliged to afford a full scale hearing in view of the limited nature" of a prejudgment remedy modification request).

Defendants rest their motion to vacate on a new financial analysis report that has been prepared by an accounting firm, Raich, Ende, Malter & Co., LLC ("Raich"). The report is not an independent audit of TriPlanet's records but is allegedly a compilation derived from TriPlanet's internal financial records and with extensive disclaimers about its reliability. (Doc. # 160 at 4).[2]

Defendants have not convincingly explained why this type of report or similar evidence could not have been adduced at the time of the initial prejudgment remedy hearing. Defendants were on notice of the need for a detailed financial accounting since the filing of this lawsuit in August 2012 and plaintiff's motion for a prejudgment remedy in October 2012. They had many months to retrieve and produce necessary financial information before Judge Underhill conducted an evidentiary hearing in March 2013 and issued his ruling in June 2013. In view that the financial information at issue concerns the affairs of a closely held company that is personally controlled by defendants Sophien and Imed Bennaceur, the Court considers it implausible that defendants' newly produced financial analysis could not have been adduced before the initial prejudgment remedy hearing and ruling.

***3** Noting that their company conducts much of its business from Tunisia, defendants complain of "civil disorder in Tunisia" and "a month of Ramadan," and they also blame delays on accounting firms that allegedly declined to assist them. But these reasons are far from persuasive. Sophien Bennaceur's affidavit attests that he had difficulties hiring an accountant, yet does not explain the reason for those difficulties. (Doc. # 133). Emails purporting to show accountants' delays are dated April and July 2013, and they do not explain the many remaining months between the time the complaint was filed in August 2012 and when defendants engaged Raich in 2013. Docs. # 133–1, # 133–2. The newspaper articles submitted by defendants about "civil unrest" in Tunisia in July and August 2013 do not explain the remaining time that has elapsed. (Doc. # 133–3).

"The law of the case doctrine commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case' unless 'cogent and compelling reasons militate otherwise.' " *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir.2009) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir.2002)); *see also Gen. Elec. Capital Corp. of Puerto Rico v. Rizvi*, 113 Conn.App. 673, 681–82, 971 A.2d 41 (2009) ("law of the case" doctrine foreclosed successive challenge to prior prejudgment remedy order in absence of "new or overriding circumstances").

Although the purpose of Conn. Gen.Stat. § 52–278k is to allow for modification of an initial prejudgment remedy order in appropriate circumstances, the statute is not an invitation to parties to delay the retrieval and production of evidence that could have been adduced at an initial hearing. Accordingly, the Court denies defendants' motion to vacate the prior prejudgment remedy order and

for a prejudgment remedy and order of asset disclosure against plaintiff. [3]

B. Plaintiff's Challenge to Defendants' Compliance with the Asset Disclosure Order

Plaintiff challenges the adequacy of defendants' compliance with the Court's prior order for asset disclosure, *see* Conn. Gen.Stat. § 52–278n, and plaintiff further moves for a preliminary injunction to compel defendants to move assets into Connecticut such that they might be readily subject to attachment. The Court first evaluates the adequacy of defendants' compliance with the Court's asset disclosure order before evaluating plaintiff's request for injunctive relief.

Following a prior dispute about defendants' failure to disclose assets, Judge Underhill entered an order on October 1, 2013, for defendants, collectively and individually, to disclose assets at least equal to the amount of the prejudgment remedy. (Doc. # 113). Defendants responded by filing a statement disclosing a software program allegedly owned by TriPlanet that defendants claim has a value of $10 million.

"[T]he burden of proving compliance with the pre-trial order rests upon the party whose duty it is to comply with the order." *Ginns v. Towle,* 361 F.2d 798, 801 (2d Cir.1966). The valuation of property disclosed pursuant to a prejudgment remedy asset disclosure order is the market value of such property, as measured by the "market" that is available to the beneficiary of the prejudgment remedy order. *Edmands v. CUNO, Inc.*, 277 Conn. 425, 456–58, 892 A.2d 938 (2006).

***4** Defendants have not adequately complied with the Court's prior disclosure order. To begin with, the Court previously required defendants to disclose "collectively *and individually,* their assets within the United States" or elsewhere if inadequate to meet the prejudgment remedy amount. (Doc. # 113 at 2 (emphasis added)). Yet only TriPlanet has purported to disclose its assets, and there has been no asset disclosure by the individual defendants Sophien and Imed Bennaceur.

Moreover, TriPlanet's disclosure is itself inadequate. Leaving aside the parties' dispute about whether intellectual property may serve as a basis for asset disclosure, it is far from clear that plaintiff could ever realize $10 million from any attachment of the software program. The $10 million valuation is supported only by means of a highly redacted offer-to-purchase letter that was allegedly furnished by an anonymous third party. This letter inspires little confidence, because it does not identify the would-be purchaser so that plaintiff could readily verify the amount claimed. In addition, plaintiff raises substantial doubts about whether TriPlanet has legal ownership of the software, and these doubts are consistent with the prior failure of defendants to have noted the software as an asset of the company in financial documents that were submitted at the prejudgment remedy hearing in March 2013.

Accordingly, defendants have failed to comply with the Court's asset disclosure order. In view of defendants' failure of compliance, the Court orders that on or before Friday, May 23, 2014, *each* one of the defendants TriPlanet, Sophien Bennaceur, and Imed Bennaceur shall individually and with specificity disclose tangible, marketable assets in the United States that are sufficient individually to meet the prejudgment remedy amount of $8,858,949. For each of defendants' disclosures, these assets must self-evidently bear the ownership name of each defendant, must have their specific location disclosed, and must have a readily determinable market value and without impediment or cloud to their attachment upon additional legal process. If any of the defendants do not have sufficient marketable assets within the United States, then each defendant shall disclose marketable assets that they hold worldwide in an amount sufficient to satisfy the prejudgment remedy order.

C. Plaintiff's Motion for a Preliminary Injunction to Move Assets

Beyond his challenge to defendants' compliance with the existing asset disclosure order, plaintiff further moves for a preliminary injunction to require defendants to move into the District of Connecticut assets sufficient to satisfy the prejudgment remedy order. A federal court

> may grant a preliminary injunction if the moving party establishes "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

*5 *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc .*, 696 F.3d 206, 215 (2d Cir.2012) (quoting *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir.2011)); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (applying a similar four-part test). [4]

Plaintiff has failed to show irreparable harm. The Second Circuit has made clear that "courts may no longer simply presume irreparable harm," but that "plaintiffs must demonstrate that, on the facts of the case, the failure to issue an injunction would actually cause irreparable harm," and "[c]ourts must pay 'particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for [the] injury.' " *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir.2012) (internal quotations and citation omitted), *cert denied,* 133 S.Ct. 1585 (2013). Put differently, "only harm shown to be non-compensable in terms of money damages provides the basis for awarding injunctive relief." *Wisdom Imp. Sales Co., LLC v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113–14 (2d Cir.2003). Thus, the Second Circuit has declined to find irreparable harm to allow an injunction that would have required out-of-state assets to be brought into a state in aid of a prejudgment remedy. *See Chem. Bank v. Haseotes,* 13 F.3d 569, 573 (2d Cir.1994) ("[t]he irreparable harm alleged by Chemical is its fear that Haseotes will render himself judgment-proof" by selling assets but "generally speaking, an injunction is not available to remedy a loss that may be remedied by an award of money damages"). The Second Circuit's decision in *Chemical Bank* is controlling here. [5]

Although I need not decide the issue, there is also good reason to doubt whether—even assuming irreparable harm—the Court has legal authority to enjoin defendants to bring their assets into Connecticut in satisfaction of a prejudgment remedy order. Indeed, the parties agree that the Court lacks inherent authority to do so under Fed.R.Civ.P. 65 and under traditional equitable relief principles of the common law. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–23 (1999). Any authority the Court might have to enjoin defendants must derive (if at all) from Connecticut law, as it may be applied in accordance with Fed.R.Civ.P. 64. Yet, Connecticut's general prejudgment remedy statute defines only four forms of prejudgment remedies (attachment, foreign attachment, garnishment and replevin), and it expressly excludes a "temporary restraining order" from the definition of a prejudgment remedy. Conn. Gen.Stat. § 52–278a(d). The Connecticut Supreme Court has otherwise warned that the statute must be strictly construed as it affords remedies in derogation of background common law. *See Feldmann v. Sebastian,* 261 Conn. 721, 725–26, 805 A.2d 713 (2002) (citations omitted). It is little wonder, then, that the Connecticut Appellate Court has observed that "[w]hether a temporary injunction should become the fifth [prejudgment remedy] must be determined by the legislature, not this court." *Rhode Island Hosp. Trust Nat. Bank v. Trust,* 25 Conn.App. 28, 31, 592 A.2d 417 (1991). In any event, because plaintiff has failed to show irreparable harm, there is no need to resolve the full scope of this Court's authority to enjoin a party to move assets into Connecticut for purposes of attachment as a prejudgment remedy. [6]

D. Defendants' Non–Compliance with Discovery Demands

*6 Plaintiff moves for sanctions against defendants for their failure to comply with discovery demands (Doc. # 121). On June 25, 2013, the Court ordered defendants to produce within ten days "all non-privileged underlying financial documents that were provided to Defendants' accounting firm(s) to enable those firms to prepare financial statements," about which Sophien Bennaceur testified during the PJR hearing on March 12, 2013. (Doc. # 79). Separately, on June 7, 2013, plaintiff also served discovery demands for a wide range of tax, banking, and other financial documentation that would cast light on whether plaintiff was properly paid his salary and equity payouts. (*See* Doc. # 121 at 10–11 (setting forth specific discovery request items)).

It is the Court's view that all these requested corporate financial records of TriPlanet as well as the income-related tax and banking records for each of the three defendants are properly discoverable because of their obvious relevance and importance to the issues in dispute in this case involving the measurement of corporate performance and the tracking and measurement of salary payments, equity interests, and equity payouts to plaintiff and Sophien and Imed Bennaceur. To the extent that defendants have objected to these categories on relevancy grounds (as they did at the last oral argument before the Court), the Court overrules these objections.

Accordingly, to the extent that they have not already done so (*e.g.*, as exhibits accompanying disclosure of the Raich firm's accounting report), defendants shall disclose on or before **Friday, May 23, 2014,** all of the records for each of the three defendants in response to the specific itemized discovery demands identified by plaintiff at pages 10–11 of Doc. # 121.

The foregoing discovery disclosure schedule is without prejudice to the Court's consideration at a later time of sanctions to be imposed against defendants for past noncompliance with discovery demands and orders. The Court further notes its intent to enter an order of sanctions against defendants—including to consider the possibility of entering default judgment—if they fail to comply with this order on or before May 23, 2014. The Court has scheduled a hearing on May 28, 2014, and it expects that the parties will be prepared to address whether defendants have complied with this order and the scope of any sanctions against the defendants that should enter in light of their production of documents in response to this order. [7]

E. Conclusion and Order

For the reasons set forth above, defendants' motion to vacate the prejudgment remedy order, to enter a new prejudgment remedy order, and to require plaintiff to disclose assets (Docs.# 157, # 158) is **DENIED.**

For the reasons set forth above, plaintiff's motion for a preliminary injunction to require defendants to bring assets into Connecticut and for sanctions against defendants for their noncompliance with discovery demands (Doc. # 121) is **DENIED.** Each of the defendants, however, shall disclose on or before **Friday, May 23, 2014,** tangible marketable assets in each of their individual names that are held in the United States and that are sufficient to meet the prejudgment remedy amount of $8,858,949. For each of defendants' disclosures, these assets must bear the ownership name of each defendant, must have their specific location disclosed, and must have a readily determinable market value and without impediment or cloud to their attachment upon additional process. If any of the defendants do not have sufficient marketable assets within the United States, then such defendant(s) shall disclose in the manner indicated above any marketable assets that they hold worldwide in their name in an amount that suffices as to each of them to satisfy the prejudgment remedy order of $8,858,949.

*7 In addition, as to plaintiff's pending financial discovery demands for which defendants have not yet produced responsive documents, defendants shall disclose on or before **Friday, May 23, 2014,** all remaining records in response to the specific itemized discovery demands identified by plaintiff at pages 10–11 of Doc. # 121. The parties shall address the issue of compliance and any sanctions for non-compliance at the hearing before the Court that is scheduled for May 28, 2014.

Defendants' cross-motion for sanctions (Doc. # 132) is **DENIED** absent a showing of plaintiff's bad faith and continuing non-compliance.

It is so ordered.

All Citations

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Footnotes

1 A fourth defendant, Moez Bennaceur, has more recently been named in the Amended Complaint (Doc. # 110) in connection with his alleged participation to engage in a fraudulent transfer of property to impede plaintiff's collection of any judgment against the remaining defendants; Moez Bennaceur has not entered an appearance and is now the subject of a motion for default judgment (Doc. # 180). Unless otherwise noted, references to "defendants" in this ruling refer to TriPlanet Partners LLC, Sophien Bennaceur, and Imed Bennaceur.

2 The cover letter to the Raich report cautions that "[w]e have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or provide any assurance about whether the financial statements are in accordance with accounting principles generally accepted in the United States of America." Doc. # 160 at 4. The cover letter additionally warns that "[m]anagement has elected to omit substantially all of the disclosures and statements of cash flows required by accounting principles generally accepted in the United States of America." *Ibid.*

3 Defendants' claims are further undercut by their own failure (as discussed below) to comply with multiple discovery demands for financial records that plaintiff would need to challenge defendants' newly produced financial evidence.

4 Both federal and state law governing preliminary injunctions require that the moving party show "irreparable harm." *See Aqleh v. Cadlerock Joint Venture II, L.P.,* 299 Conn. 84, 97, 10 A.3d 498 (2010) (quoting *Moore v. Ganim,* 233 Conn. 557, 569 n. 25, 660 A.2d 742 (1995)). Therefore, I need not decide whether, when applying state law for prejudgment remedies pursuant to Fed.R.Civ.P. 64, I should correspondingly apply the state law standard for issuance of a preliminary injunction. *Cf. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 318 n. 3 (1999) (noting but not deciding similar choice-of-law issue for preliminary injunctive relief under Fed.R.Civ.P. 65).

5 It is true that an exception may exist for "monetary injury situations involving obligations owed by insolvents" or otherwise "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied," *Brenntag Int'l Chemicals, Inc. v. Bank of India,* 175 F.3d 245, 249–250 (2d Cir.1999), but the facts of this case do not remotely suggest that defendants are insolvent or on the brink of bankruptcy.

6 Plaintiff mischaracterizes certain precedent to hold that "the Court may enjoin Defendants to bring into the State of Connecticut assets sufficient to effectuate a prejudgment remedy of attachment." (Doc. # 121–1 at 18 (citing cases); *see also* Doc. # 139 at 7–8). For example, Judge Kravitz's ruling in *Mammoet USA NE Corp. v. Dick Corp.,* No. 3:02CV2022 (MRK), 2003 WL 22937724 (D.Conn. Oct. 9, 2003), expressly declined to resolve this issue, noting that "the issue of the scope of [the Court's] power to enter such orders is entirely hypothetical." *Id.* at *2. Similarly, Judge Margolis's ruling in *Great Am. Ins. Co. of N.Y. v. Summit Exterior Works, LLC,* No. 3:10CV1669 (JBA), 2001 WL 4742218 (D.Conn. Oct. 6, 2011), did not address the asset-transfer issue. Nor could plaintiff properly rely on decisions involving special injunctive authority under a Connecticut statute involving security certificates that is not at issue in this case. *See Inter–Reg'l Fin. Grp., Inc. v. Hashemi,* 562 F.2d 152, 154–55 (2d Cir.1977); *Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.,* 221 F.R.D. 300, 302–03 (D.Conn.2003). Nevertheless, other decisions that are not binding on this Court tend to support plaintiff's position. *See, e.g., Metal Mgmt., Inc. v. Schiavone,* 514 F.Supp.2d 227, 240 (D.Conn.2007) (dicta stating that "[t]he district court possesses the authority to transfer [defendant's] assets into Connecticut to effect a prejudgment remedy" but reserving issue whether injunction requirements are met); *Hamma v. Gradco Sys., Inc.,* Nos. B:89–437 (JAC), 8:88–115(JAC), 1992 WL 336740, at *3 (D.Conn. Nov. 4, 1992) (predicating authority to order movement of out-of-state assets into the state "on the court's *in personam* jurisdiction, which gives the court inherent equitable authority to order a party to do certain acts either within or outside the court's territorial jurisdiction").

7 It is the Court's understanding from the last hearing that plaintiff has now complied with outstanding discovery demands but, if this is not so then plaintiff shall ensure full compliance by May 23, 2014, and the Court will similarly consider the entry of sanctions against plaintiff if there is continuing non-compliance.

End of Document